A

MAS ANITA ABDULLAH

v.

LEW WAI KOUNG

B

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCvC-306-03-2012]
4 DECEMBER 2012

C ***CIVIL PROCEDURE:*** *Security for costs - Application for - Failure to disclose residential address - Plaintiff frequently out of country - Whether plaintiff required to furnish security for costs - Whether plaintiff able to pay costs if claim dismissed and costs ordered against plaintiff - Whether order justified - Rules of Court 2012, O. 23 r. 1*

D The defendant obtained judgment against the plaintiff for arrears in rental and vacant possession. However, the plaintiff failed, refused and/or neglected to pay the amount to the defendant. The defendant therefore filed an application in encl 17 for: (i) an order that the plaintiff be required to give security for costs in the sum E of RM60,000 under O. 23 r. 1 of the Rules of Court 2012 ('ROC'); and (ii) that all proceedings of the action be stayed until the security for costs was paid within a period of 14 days from the date of the order.

F **Held (allowing application):**

(1) The fact that the plaintiff had not paid the judgment sum to the defendant although the sealed copy of the judgment had been served on her showed that the plaintiff was incapable of G paying costs to the defendant should the plaintiff's claim be later dismissed by the court and costs ordered against the plaintiff. (para 3)

(2) Order 23 r. 1(1)(c) of the ROC provides that the court has H the discretion to order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it deems just if the plaintiff's address is not stated in the writ or is incorrectly stated therein. A similar order can be given under O. 23 r. 1(1)(a) if it appears to the court that the plaintiff is I ordinarily resident out of the jurisdiction or under O. 23 r. 1(1)(d) if the plaintiff has changed her address during the course of the proceedings with a view to evading the consequences of the litigation. (paras 5 & 8)

(3) It was highly probable from the failure of the plaintiff to state her residential address in the writ of summons and the failure to disclose the identity card number of the owner of the flat that she did not have a permanent residential address or she was deliberately refraining from disclosing the same. Also, in view of the fact that the plaintiff was frequently out of the country, it was necessary that she be required to furnish her security for costs. (paras 4 & 5)

(4) The plaintiff also had not disclosed that she had assets in Malaysia nor did she give any statement, supported by documentary evidence of the financial capability to pay all costs, if ordered against her. In view of all the circumstances of the case, the amount for the security costs ordered was not excessive or oppressive to the plaintiff. (paras 6 & 7)

[Plaintiff ordered to pay RM40,000 as security for costs.]

Case(s) referred to:
Ace King Ltd v. Circus American Ltd & Ors [1983] 2 CLJ 255; [1983] CLJ (Rep) 444 ***(refd)***
Adarsh Pandit v. Viking Engineering Sdn Bhd [1996] MLJU 594 ***(refd)***
Aeronave S P A & Westland [1971] 1 WLR 1146 ***(refd)***
Faridah Begum Abdullah v. Dato' Michael Chong [1995] 2 CLJ 951 HC ***(refd)***
Shaik Ali v. Shaik Mohamed [1983] MLJ 310 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 23 r. 1(1)(a), (c), (d)

For the defendant - Vincent Tey Wei Seng; M/s Lainah Yaacob & Zulkepli
For the plaintiff - Yau Lap Ho; M/s Yap Lap Ho & Co

Reported by S Barathi

JUDGMENT

Yeoh Wee Siam J:

Enclosure 17

[1] This is the defendant's application for the following orders:

(a) that the plaintiff be required to give security for costs in the sum of RM60,000 under O. 23 r. 1 of the Rules of Court 2012 ("the ROC");

(b) that all proceedings of this action be stayed until the security for costs is paid by the plaintiff to the defendant's solicitors as stakeholder and the plaintiff's action herein be struck out forthwith unless the security for costs is paid within a period of 14 days from the date of the order of this honourable court;

(c) that costs be in the cause; and

(d) other order or relief deemed just and fair by this honourable court.

Court's Decision On 29 October 2012 Regarding Encl. 17

[2] The defendant's application is allowed except that the sum for security for costs is RM40,000.

Grounds For The Court's Decision

[3] According to the evidence, the defendant had obtained a judgment against the plaintiff on 13 September 2011 in the Kuala Lumpur Sessions Court *vide* Summons No. 52-16151-2011 for arrears in rental amounting to RM6,750, interest at 8% per annum, costs of RM408 and vacant possession but the plaintiff still failed, refused and/or neglected to pay the amount to the defendant until the date of the filing of this action, even though the plaintiff was served with a sealed copy of the judgment. This fact alone, without prejudice to the merits of the present case, shows that the plaintiff is capable of not paying costs to the defendant should the plaintiff's claim be later dismissed by the court and costs be ordered against the plaintiff.

[4] The plaintiff did not state her residential address in the writ of summons. She merely stated that her address for service is at PO Box 12633, 50792 Kuala Lumpur. In the plaintiff's affidavit in reply (encl. 21) she stated that she used the PO Box address because she was chased out by the defendant from her rented premises at No. 24-A, Jalan 5/60A, Taman Desa Segambut, 51200 Kuala Lumpur. In her second affidavit in reply (encl. 37) she stated that she was allowed to stay at the flat at 30-02-04, Sri Melaka Cheras, 56100 Kuala Lumpur, which is owned by one Ibrahim bin Kassim. However, the identity card number of Ibrahim bin Kassim ("Ibrahim") is not disclosed by the plaintiff. The

defendant contended that the plaintiff is not telling the truth about her residence at Ibrahim's address. It is highly probable that the plaintiff does not have a permanent residential address or she is deliberately refraining from disclosing the same. This shows that there is ample justification for the defendant to apply for security for costs from the plaintiff pending the final disposal of the suit.

[5] From the records of the plaintiff's passport exhibited by the defendant in exh. LWK1, it can be seen that the plaintiff was frequently out of the jurisdiction of this court from 2009 to 2011, and was in various countries such as Australia, Singapore, Indonesia, Philippines and China. In para. 7 of the statement of claim, the plaintiff averred that she was on business in Australia from 21 September 2011 to 16 November 2011. On 4 September 2012 the plaintiff's solicitors wrote to the court asking for the full trial dates fixed on 24 September 2012 and 9 October 2012 to be vacated because the main witness ie, the plaintiff was attending a meeting out of the country ie, in UAE and would only be back on 27 September 2012. The plaintiff's solicitors enclosed a copy of the plaintiff's air ticket back to Malaysia but the court notes that the plaintiff's Air Asia flight on 27 September 2012 was from Bali, Indonesia, and not from the UAE. It appears to me that even the plaintiff's own solicitors did not know her exact whereabouts outside the jurisdiction of this court. In encl. 37, the plaintiff stated that she was in Indonesia from 16 September 2012 to 27 September 2012. On 28 August 2012 when the court had to fix dates for further case management and action by both parties, counsel for the plaintiff asked for more time to take instructions because the plaintiff was away in Australia. In view of the fact that the plaintiff is frequently out of the country, it is necessary that she be required to furnish her security for costs. This will serve as a guarantee that, at the end of the day, should costs be awarded in favour of the defendant, in all fairness and in the interest of justice, the defendant would be able realise such costs. In *Aeronave S P A & Westland* [1971] 1 WLR 1146 Lord Denning MR stated "After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order."

[6] The plaintiff has not disclosed that she has assets in Malaysia. She also did not give any statement, supported by documentary evidence, of her financial capability to pay all costs, if ordered against her. There are ample authorities on security for costs being ordered by the court when a plaintiff does not have assets within the jurisdiction (see eg, *Adarsh Pandit v. Viking Engineering Sdn Bhd* [1996] MLJU 594, *Shaik Ali v. Shaik Mohamed* [1983] MLJ 310 and *Ace King Ltd v. Circus American Ltd & Ors* [1983] 2 CLJ 255; [1983] CLJ (Rep) 444; [1985] 2 MLJ 75).

[7] There is no legal requirement that the defendant gives a detailed bill of costs before he can make this application. The rules regarding the exercise of the court's discretionary powers to order security for costs are not inflexible or rigid (see *Faridah Begum Abdullah v. Dato' Michael Chong* [1995] 2 CLJ 951; [1995] 2 MLJ 404). The amount for the security for costs which I ordered is a reasonable sum ie, RM40,000 and not RM60,000 as applied for by the defendant. According to the defendant, the amount of RM60,000 is less than 10% of the amount claimed by the plaintiff for the losses she suffered when the defendant took possession of the premises occupied by the plaintiff. The amount of RM40,000 is therefore an even lower percentage than 10% of the plaintiff's claim. I do not think that this amount is excessive or oppressive to the plaintiff. In fact, this amount is much less than the security for costs that this court has ordered for several other cases.

[8] Under O. 23 r. 1(1)(c) of the ROC, the court has the discretion to order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it deems just if the plaintiff's address is not stated in the writ or is incorrectly stated therein. A similar order can be given under O. 23 r. 1(1)(a) if it appears to the court that the plaintiff is ordinarily resident out of the jurisdiction, or under O. 23 r. 1(1)(d) if the plaintiff has changed her address during the course of the proceedings with a view to evading the consequences of the litigation. From paras. 7 and 10 of the statement of claim, the plaintiff came back from Australia on 17 November 2011 (after being away for nearly two months) and found that the defendant had taken possession of the premises which the plaintiff alleged was rented from the defendant. The writ of summons was filed on 12 March 2012 and the plaintiff did not state her residential

address in the writ. In encl. 21 she stated that she only had the PO Box address because the defendant chased her out from the rented premises. It is highly improbable that from 17 November 2011 to 12 March 2012, for nearly four months, the plaintiff did not have her own residential address in Malaysia. Having regard to all the circumstances of the case, I am satisfied that it is imperative that security for costs be ordered in case the plaintiff later attempts to evade the consequences of her litigation.

Order accordingly.